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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Tariff Filing Requirements for)
Nondominant Common Carriers)

CC Docket No. 93-36

**REPLY OF AD HOC TELECOMMUNICATIONS USERS COMMITTEE
TO MCI OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION**

The Ad Hoc Telecommunications Users Committee (Ad Hoc Committee) hereby replies to the October 29, 1993, Opposition of MCI Telecommunications Corporation (MCI) to the Ad Hoc Committee's Petition for Partial Reconsideration of the Commission's Memorandum Opinion and Order (MO&O) released August 18, 1993, in the above-captioned proceeding.

In its petition, the Ad Hoc Committee urged the Commission to correct its previous error and establish procedural mechanisms for assuring that agreements between carriers and their customers are as enforceable as those in other competitive industries. Because the documents governing the vendor-customer relationship in the telecommunications common carriage industry are ultimately the carriers' tariffs, it is imperative that the Commission not let nondominant carriers use the tariffing process as a means of unilaterally abrogating their agreements or modifying them to their customers' detriment.

All users commenting on the Ad Hoc Committee's petition wholeheartedly supported it. See Comments of Citicorp; Comments in Support of Petition for Partial

Reconsideration of American Petroleum Institute (API); Comments of the Information Industry Association (IIA); and Comments of Tele-Communications Association (TCA), all filed October 29, 1993, and Reply Comments of the Custom Network Service Users Group (CNSUG) on the Petition for Partial Reconsideration, filed on November 8, 1993.

The only party of any kind to take issue with any aspect of the Ad Hoc Committee's petition was MCI, yet even MCI did not quarrel with "the specifics of the Committee's proposals." MCI Opposition at 1. MCI limits itself to two points. The first is that the Ad Hoc Committee stance "clearly run[s] counter to the deregulatory environment the Commission is seeking to foster, in the public interest." Id. But the Commission was seeking to foster competition, not anarchy. The intent was to assure that nondominant carriers are no more regulated than their unregulated brethren. It was not, surely, to excuse nondominant carriers from adhering to their contracts in the same manner as vendors in competitive industries. MCI's incantation of the mantra "deregulation" is, taken to its logical end, nothing more than the assertion that the entire marketplace would be better off if no vendor of any kind were bound to its contracts. The Commission has certainly never reached this conclusion. And the experience of trucking customers

in the wake of the Maislin decision^{1/} is brutal testimony to the fact that nothing could be further from the "public interest" than the kind of "deregulation" MCI appears to be advocating.

MCI's second line of attack is to assert that the Ad Hoc Committee misconstrued the case of Brookman & Brookman, P.C. v. MCI, 86 Civ. 7040 (CSH), 1991 U.S. Dist. LEXIS 7937, S.D.N.Y. (judgment entered June 19, 1991), which was cited in the Ad Hoc Committee's comments in footnote 4 (page 5). According to MCI's opposition, the customers who complained in Brookman alleged that they had an oral contract with SBS (later acquired by MCI) for calling card services that was inconsistent with the SBS tariff, but there was no evidence of such a contract. Opposition at 2. According to MCI, the SBS calling card was provided "exclusively under a tariff." Id. In other words, MCI is essentially denying, as a factual matter, the existence of a conflict between tariff and contract in the Brookman case.

But the fact is that MCI sought -- and was granted -- summary judgment in Brookman on the basis that even if a contract existed, and even if the contract and tariff were inconsistent, the contract was, as a matter of law, superseded by the filed tariff, and that accordingly, the customers were "legally foreclosed" from relying on the

^{1/} See Ad Hoc Committee Petition at 8; see also Reply Comments of CNSUG at 3.

alleged contract. See attached order from Brookman, sixth paragraph. The court's ruling did not, contrary to MCI's implication, hinge on the disputed factual question of whether a contract existed, or whether such contract was in fact inconsistent with the tariff -- as indeed it could not, under the federal court rules dealing with summary judgments. See Fed. R. Civ. Proc. 56(c).^{2/}

In the Brookman case, when a dispute arose, MCI did what most parties would do in such contexts. It put forward all legal arguments that would further its position. And the argument on which it won was the argument that, whether or not it had a contract with the SBS subscribers, it was not bound by that contract where inconsistent with its tariff. In short, for litigation purposes, MCI took advantage of the very legal anomaly that prompted the Ad Hoc Committee's petition in the first place, and competitive forces did not dissuade it from doing so.

There is nothing illegal or immoral about this: MCI merely availed itself of its legal rights as it -- and ultimately the presiding court -- saw them. But the point

^{2/} MCI's assertion (Opposition at 2) that the Brookman court's ruling has no application to written agreements is patently meritless. The Brookman court held that plaintiff was legally foreclosed from claiming that "a contract" existed obligating MCI in a manner inconsistent with the tariff. Brookman order, sixth paragraph. Nothing in the court's reasoning was limited to an oral rather than a written contract: the court ruled on the basis of the filed rate doctrine, not the Statute of Frauds.

is that MCI's behavior in relying on those rights was entirely consistent with the rational behavior of a participant in a competitive marketplace, and its successful argument in Brookman is further support for the proposition that competition alone is no substitute for the legal enforceability of agreements.

Of course, this does not mean that MCI is likely to abrogate all its contracts in cavalier fashion, though as the post-Maislin experience of trucking customers shows, carriers with less to lose than MCI might well do so. But if the Commission fails to act, in the event of a dispute, customers of any nondominant carrier (including MCI) will find that they are not able to rely on the terms of a mutually framed agreement -- not even if it has initially been tariffed in its entirety. Instead they will be at the mercy of unilateral tariff revisions which may be made by the carrier at any time on one day's notice. This state of affairs will, in the long run, enfeeble rather than strengthen the competitive marketplace the Commission seeks to foster.

Nondominant communications common carriers are no better and no worse than vendors in other competitive industries and they should be subject to the same market

rules. The Commission should grant the Ad Hoc Committee's petition, and adopt rules and policies which provide for the maximum enforceability of carrier agreements consistent with the Communications Act.

Respectfully submitted,

**AD HOC TELECOMMUNICATIONS
USERS COMMITTEE**

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November 12, 1993

Its Attorneys

2ND CASE of Level 1 printed in FULL format.

BROOKMAN & BROOKMAN, P.C. individually and on behalf of all other persons, firms and corporations similarly situated, Plaintiffs, v. MCI TELECOMMUNICATIONS CORPORATION and SATELLITE BUSINESS SYSTEMS, Defendants

No. 86 Civ. 7040 (CSH)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1991 U.S. Dist. LEXIS 7937

June 7, 1991, Decided

June 12, 1991, Filed

JUDGES: [*1]

Charles S. Haight, Jr., United States District Judge.

OPINIONBY: HAIGHT

OPINION: MEMORANDUM OPINION AND ORDER

In a Memorandum Opinion and Order dated February 2, 1990, familiarity with which is assumed, the Court denied defendants' motion to dismiss this action for lack of jurisdiction and failure to state a claim. Following discovery, plaintiff moves for class certification under Rule 23, Fed.R.Civ.P., and defendants move under Rule 56 for summary judgment dismissing the complaint. If defendants' motion for summary judgment is well founded, plaintiff's motion for class certification becomes moot.

Defendants support their motion for summary judgment by affidavits of officers of defendant MCI Telecommunications Corporation ("MCI") whose responsibilities lie in the areas of regulatory law, rates and tariffs. Those affidavits and the exhibits which accompany them in turn support defendants' statement of uncontested facts pursuant to Civil Rule 3(g) of this Court.

The undisputed facts are that defendant Satellite Business Systems ("SBS") was, and MCI is, a long distance telecommunications carrier offering regulated telecommunications services pursuant to tariffs filed with the Federal Communications [*2] Commission pursuant to the Federal Communications Act, 47 U.S.C. § 151 et. seq. Plaintiff became an SBS customer in March 1985. The charges plaintiff paid to SBS, as described in the complaint, were levied by SBS in accordance with the rate of charges set forth in the SBS tariff.

In late 1985, MCI and SBS entered into an agreement pursuant to which MCI acquired control of SBS. The Federal Communications Commission approved that acquisition in February 1986. To implement the acquisition and merger, SBS filed with the FCC a revision to its tariff, providing that SBS would discontinue its tariffed service offerings effective June 1, 1986 and that replacement services would be available in accordance with the terms, conditions and rates of the MCI tariff. Subsequent SBS tariff revisions discontinued all SBS service offerings, effective June 1, 1986; and MCI succeeded to SBS's business, offering services at charges specified in the MCI tariff.

Plaintiff's Rule 3(g) statement does not traverse any of these factual statements by defendants. Plaintiff responds to defendants' Rule 3(g) statement as if its contents constituted requests for admission under Rule 36, Fed.R.Civ.P.: plaintiff [*3] admits some of the numbered paragraphs, denies others, and proffers argumentative material with respect to most. But that is not the function of the moving party's Rule 3(g) statement; and the burden of the party resisting summary judgment is to include in its Rule 3(g) statement "a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." Plaintiff at bar substitutes argument for such factual statements.

Defendants are entitled to summary judgment because the undisputed facts reveal that first SBS and then MCI charged plaintiff for their services in accordance with the rates contained in their filed tariffs. In those circumstances, plaintiff is legally foreclosed from claiming that a contract existed between SBS and plaintiff, binding upon MCI as the successor to SBS, which obligated MCI to charge rates inconsistent with the MCI tariff. See

Nordlicht v. New York Telephone Co., 799 F.2d 859, 866 (2d Cir. cert. denied, 479 U.S. 1055 (1987)) ("... the filed tariff doctrine requires NYTel to bill its phone calls in accordance with the tariffs and prevents Nordlicht from [*4] making any challenge to these rates.") The Second Circuit in Nordlicht cited as authority for that proposition *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 163 (1922), which articulated the filed tariff doctrine in the context of interstate carriage:

The legal rights of a shipper as against carrier in respect to a rate are measured by the published tariff. . . . Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

A claim of fraud in the inducement may survive the

filed tariff doctrine, if pleaded with the particularity required by Rule 9(b), Fed.R.Civ.P. Nordlicht at 866-67. But the complaint at bar sounds only in contract and is precluded by the filed tariff doctrine.

There is no substance to plaintiff's argument that this Court resolved the effect of the filed tariffs in its favor in the prior opinion denying defendants' motion to dismiss. The issue which is dispositive on defendants' motion for summary judgment was neither presented to the Court nor considered [*5] in the disposition of that earlier motion.

Defendants' motion for summary judgment is granted. The Clerk of the Court is directed to dismiss the complaint with prejudice. Plaintiff's motion for class certification is denied as moot.

It is SO ORDERED.

CERTIFICATE OF SERVICE

I, Charles D. Teagle, Jr., a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 12th day of November, 1993, caused to be sent by first-class U.S. mail, postage-prepaid, a copy of the foregoing **REPLY OF AD HOC TELECOMMUNICATIONS USERS COMMITTEE TO MCI OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION** to the following:


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